(3)

No. 87-978

FILED
MAR 16 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS, AMERICAN PUBLIC GAS ASSOCIATION, PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, NEW YORK PUBLIC SERVICE COMMISSION, AND UNITED DISTRIBUTION COMPANIES

FREDERICK MORING *
JENNIFER N. WATERS
TONI M. FINE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500
Attorneys for Respondent Associated Gas Distributors

* Counsel of Record

[Additional Attorneys Listed on Inside Cover]

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

40

WILLIAM T. MILLER
SUSAN N. KELLY
MILLER, BALIS & O'NEIL, P.C.
1101 14th Street, N.W.
Suite 1400
Washington, D.C. 20005
(202) 789-1450
Attorneys for Respondent
American Public Gas Association

JANICE E. KERR
J. CALVIN SIMPSON
MICHAEL B. DAY
PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, California 94102
(415) 557-0336
Attorneys for Respondent
Public Utilities Commission of
the State of California

RICHARD A. SOLOMON
WILNER & SCHEINER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-7830
Attorney for Respondent New York
Public Service Commission

ROBERTA L. HALLADAY
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-7651

C. WILLIAM COOPER
Chairman, United
Distribution Companies
606 Broad Street
Sewickley, Pennsylvania 15143
(412) 741-4836
Attorneys for Respondent United
Distribution Companies

March 16, 1988

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE PETITION	6
CONCLUSION	12
APPENDICES	
Appendix A	1a
Appendix B	8a
Appendix C	12a
Appendix D	15a

TABLE OF AUTHORITIES

Cases — Page

Abbott Laboratories v. Gardner, 387 U.S. 136 (1967) 9
Mobil Oil Corp. v. FPC, 417 U.S. 283 (1974) 6, 7

Administrative Decisions

Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 500, Interim Rule and Statement of Policy, 52 Fed. Reg. 30,334 (1987), 52 Fed. Reg. 35,539 (1987); Order No. 500-A, Interim Rule; Order Granting Extension of Time for Responses to Take-or-Pay Data Request, 52 Fed. Reg. 39,507 (1987); Order No. 500-B, Order Denying Rehearing in Part, Granting Rehearing in Part, and Modifying Prior Order, 52 Fed. Reg. 39,630 (1987); Order No. 500-C, Order on Rehearing Modifying Prior Orders and Requesting Comments, 52 Fed. Reg. 48,986 (1987); Order No. 500-D, Order Modifying Dates (issued March 8, 1988), —— Fed. Reg. —— (1988) ..... *passim*

Statutes

Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982) .. 4
Section 5, 15 U.S.C. § 717d ..... *passim*
Section 7, 15 U.S.C. § 717f 8, 9
Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* (1982) 5
Section 102(d), 15 U.S.C. § 3312(d) 10

Miscellaneous

Joint Comments of Indicated Producers on FERC Order No. 500, Docket No. RM87-34-000 (October 13, 1987) 8
Respondents' Brief in Opposition On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit, Nos. 87-976, 87-977, 87-1091 (February, 1988) .. 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-978

SHELL OFFSHORE INC., *et al.*,
Petitioners,

v.

ASSOCIATED GAS DISTRIBUTORS, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

BRIEF IN OPPOSITION FOR RESPONDENTS ASSOCIATED GAS DISTRIBUTORS, AMERICAN PUBLIC GAS ASSOCIATION, PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, NEW YORK PUBLIC SERVICE COMMISSION, AND UNITED DISTRIBUTION COMPANIES

Associated Gas Distributors (AGD),[1] American Public Gas Association (APGA),[2] th Public Utilities Commis-

[1] AGD is an informal association of some 40 local gas distribution utilities. Pursuant to Sup. Ct. R. 28.1, a list of AGD member companies and their affiliates is attached as Appendix A hereto.

[2] APGA is an informal, not-for-profit association which was formed to further the interests of publicly-owned natural gas dis-

sion of the State of California, the New York Public Service Commission, and the United Distribution Companies (UDC),[3] petitioners and intervenors in the proceeding below, hereby respond in opposition to the petition of Shell Offshore Inc., *et al.* for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit.[4]

STATEMENT OF THE CASE

Petitioners seek review of the portion of the opinion of the lower court in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987) (*AGD v. FERC*) (Pet. App. at 1a-128a) [5] reversing and remanding Order No. 436 for its failure to explain adequately its inaction on the industry-wide take-or-pay problem.[6] In Order No.

---

tribution systems. APGA currently has over 225 member systems located in 33 states. Although counsel does not believe that a list of APGA's member systems is required by Sup. Ct. R. 28.1, such a list is attached hereto for the Court's convenience as Appendix B.

[3] UDC is an *ad hoc* group of 32 organizations which provide gas utility service to the general public. Pursuant to Sup. Ct. R. 28.1, a list of UDC member companies and their affiliates is attached as Appendix C hereto.

[4] The petition for a writ of certiorari filed by Shell Offshore Inc., *et al.* in No. 87-978 is one of a number of petitions pending in this Court seeking review of the decision in *Associated Gas Distributors v. FERC*, 824 F.2d 981 (D.C. Cir. 1987). The parties to this brief take no position on whether a writ of certiorari is warranted for review of the questions presented in any of the other petitions, but reserve their rights, jointly and severally, to brief those questions should certiorari be granted.

[5] "Pet. App." references are to the Appendices to Petition for Writ of Certiorari of Shell Offshore Inc., *et al.* in No. 87-978.

[6] The Commission's orders below consisted of a Final Rule, one modification to the Final Rule and a number of orders denying rehearing or reconsideration. Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 436, Final Rule and Statement of Policy, 50 Fed. Reg. 42,408 (1985); Order No. 436-A,

436, the Federal Energy Regulatory Commission ("Commission" or "FERC") undertook a major rulemaking proceeding which "envisages a complete restructuring of the natural gas industry" (Pet. App. at 17a). The court's opinion upheld the major provisions of the Commission's action, but remanded the case to the Commission for further consideration of several "interdependent" (Pet. App. at 124a) aspects of the Commission order. Petitioners in No. 87-978 seek this Court's review of the court of appeals' directive that the Commission reconsider its determination to take no affirmative action in Order No. 436 with respect to the major take-or-pay problem facing the interstate pipelines, despite the substantial adverse impact of Order No. 436 upon the take-or-pay situation.

The primary objective of FERC Order No. 436 was to open up the natural gas industry to competition through enhanced transportation of gas supplies by interstate pipelines. Previously, gas was generally purchased from producers by the pipelines under long-term contracts and resold to local distributors for ultimate disposition. The objective of increased competition was achieved by the Commission in Order No. 436 by "unbundling" the pipeline's merchant and transportation roles. Any pipeline seeking to secure blanket certificates for the transportation of gas, which are a competitive necessity in most instances, would be required to provide open, non-discriminatory transportation on a "first-come,

---

Final Rule; Order Granting in Part and Denying in Part Applications for Rehearing, Denying Petition for Stay, and Granting Clarification, 50 Fed. Reg. 52,217 (1985); Order No. 436-B, Order Granting in Part Petitions for Rehearing and Reconsideration, 51 Fed. Reg. 6398 (1986); Order No. 436-C, Order Denying Rehearing, 51 Fed. Reg. 11,566 (1986); Order No. 436-D, Order Denying Applications for Rehearing, 51 Fed. Reg. 11,569 (1986); Order No. 436-E, Order Denying Request for Reconsideration, 51 Fed. Reg. 11,566 (1986). For ease of reference, the Order No. 436 series will be referred to herein as "Order No. 436."

first-served" basis pursuant to rate standards established by the Commission. Order No. 436 also furthered the goal of enhanced competition by authorizing the pipelines' existing firm sales customers to reduce or convert to firm transportation all of their contract demand obligations to purchase pipeline gas over a period of five years.

The parties to this brief, as well as most of the other local distribution companies and state commissions filing comments in the Commission's rulemaking proceeding, noted in their comments that the shift by pipelines' customers from sales to transportation service made possible by the Commission's proposed rulemaking would compound the already serious problem resulting from the multi-billion dollar pipeline take-or-pay obligations under existing long-term, high-priced contracts. These parties urged the Commission to take affirmative action to relieve the pervasive take-or-pay problem. Primary among the suggested avenues for such relief were that the Commission (1) condition a pipeline's obligation to transport a producer's gas sold directly to a distributor or end-user upon the producer's reformation of its problem contracts, and (2) exercise its authority under Section 5 of the Natural Gas Act, 15 U.S.C. §§ 717 *et seq.* (1982) (NGA) to prescribe the just and reasonable terms for contracts it found to have become unjust, unreasonable, unduly discriminatory, or preferential. *See* 15 U.S.C. § 717d.

The Commission in Order No. 436 refused to follow either of those paths for take-or-pay relief. Pet. App. at 78a-79a. Nor did it take any other affirmative action. *Id.* Instead, it limited itself to urging the producers and pipelines to reform their problem contracts, and to reassuring the producers that any buy-out or buy-down payments the pipelines might make in settlement of accrued take-or-pay obligations, or to reform problem contracts, would not be construed by the Commission to vio-

late the ceiling rates prescribed by the Natural Gas Policy Act of 1978, 15 U.S.C. §§ 3301 *et seq.* (1982) (NGPA). Pet. App. at 76a-77a.

Judicial review of Order No. 436 was sought by members of "[v]irtually every sector of the natural gas industry," and the Commission's rulemaking was challenged on "a dazzling array of errors and omissions." Pet. App. at 18a. The court of appeals in *AGD v. FERC* "[upheld] the substance of Order No. 436 and the procedures the Commission employed in adopting it" (Pet. App. at 123a), but concluded that FERC's decision to take no affirmative action on the take-or-pay problem, which it found had been "dramatically increase[d]" by the Commission's actions in Order No. 436 (Pet. App. at 83a), "reflects questionable legal premises and fails to meet the requirement of 'reasoned decisionmaking.'" Pet. App. at 80a. Accordingly, it remanded the matter to the Commission "to determine, in light of our discussion of its questionable factual and legal premises, to what extent these policy considerations may justify its inaction on the uneconomical producer-pipeline contracts." Pet. App. at 94a. Judge Mikva joined in the court's conclusion that the Commission's explanation for its refusal to act on the take-or-pay problem was inadequate, but dissented from the majority's suggestion that the Commission on remand might again refrain from any positive action. Pet. App. at 126a.

On August 7, 1987, the Commission issued Order No. 500 [7] which was designed "to respond to the Court's con-

---

[7] Regulation of Natural Gas Pipelines After Partial Wellhead Decontrol, Order No. 500, Interim Rule and Statement of Policy, 52 Fed. Reg. 30,334 (1987), 52 Fed. Reg. 35,539 (1987); Order No. 500-A, Interim Rule; Order Granting Extension of Time for Responses to Take-or-Pay Data Request, 52 Fed. Reg. 39,507 (1987); Order No. 500-B, Order Denying Rehearing in Part, Granting Rehearing in Part, and Modifying Prior Order, 52 Fed. Reg. 39,630 (1987); Order No. 500-C, Order on Rehearing Modifying Prior

cerns about Order No. 436 on an interim basis . . . ." 52 Fed. Reg. 30,335 (1987).[8] With respect to the take-or-pay issue, Order No. 500 adopted a limited process under which pipelines would not be required to transport gas sold directly by producers to local distribution companies or end-users unless the producers agreed to credit the pipeline's take-or-pay obligations accrued since Order No. 436 became effective. This action is the subject of a number of petitions for review in various courts of appeals, including petitions by most of the petitioners in No. 87-978.[9] The rule was issued on an interim basis pending "a more thorough examination of the issues [identified by the court] before developing a final rule." 52 Fed. Reg. 30,335 (1987). By Order of September 15, 1987, the Court of Appeals for the District of Columbia Circuit permitted Order No. 500 to be immediately effective, and the Commission's open-access transportation rules—which represent the crux of Order No. 436—are thus fully in effect.

REASONS FOR DENYING THE PETITION

1. None of the circumstances identified by this Court as warranting the granting of a writ of certiorari is present here. This Court has expressed the view that review of Commission orders is "primarily the task of the court of appeals," *Mobil Oil Corp. v. FPC*, 417 U.S. 283, 309 (1974), and that the Supreme Court's " 'authority is essentially narrow and circumscribed.' " *Id.*, quot-

---

Orders and Requesting Comments, 52 Fed. Reg. 48,986 (1987); Order No. 500-D, Order Modifying Dates (issued March 8, 1988), —— Fed. Reg. —— (1988).

[8] Significantly, the Commission did not seek rehearing of the court's decision, nor has it petitioned this Court for a writ of certiorari.

[9] The parties to this brief believe that the Commission's response to the court of appeals' mandate thus far is completely inadequate, and are also pursuing judicial challenges below.

ing *Permian Basin Area Rate Cases*, 390 U.S. 747, 766 (1968). Where Congress has placed responsibility for review "'in the keeping of the Courts of Appeals,'" "'[t]his Court will intervene only . . . when the standard appears to have been misapprehended or grossly misapplied.'" *Mobil Oil Corp., supra*, 417 U.S. at 310, quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 491 (1951).

As is shown below, the court of appeals did not "misapprehend" or "grossly misapply" the standard of judicial review. *See Mobil Oil Corp., supra.* Indeed, the court was fully aware and respectful of the Commission's primary responsibility with respect to the matters addressed in the orders under review, and judged the Commission's determinations by applying factual findings and policy judgments made by FERC itself. Under the circumstances, the issues presented here do not meet the guidelines established by this Court for the granting of a writ of certiorari, and the petition should therefore be denied.

2. Petitioners cite three reasons why this Court should grant the petition. None of petitioners' purported reasons can support the granting of the writ because, as a threshold matter, the court did none of the things that petitioners find objectionable. Petitioners argue that:

(a) the court of appeals "disregarded" statutory limitations on the Commission's authority to take action to affect uneconomic contracts;

(b) the court of appeals engaged in its own economic analyses and factual findings;

(c) the court of appeals deprived the Commission of its discretion to select the proceeding in which it will address the take-or-pay issue.

Each of these contentions is based on an erroneous reading of the *AGD v. FERC* opinion and should be rejected as a basis for review by this Court.

a. The thrust of petitioners' first argument appears to be that the court of appeals effectively required the Commission to take some specific action which petitioners assert is beyond the Commission's power. *See* Petition at 9, 13, 17.[10] Petitioners admit that the court's remand ordered the Commission to provide a more detailed rationale for its failure to deal with the take-or-pay crisis (Petition at 9, 17), but suggest that the granting of the writ is warranted because "[t]he court of appeals' mandate has been widely interpreted as a requirement for Commission action." Petition at 9. Petitioners' challenge amounts to a premature and collateral attack on Order No. 500. Indeed, petitioners virtually acknowledge that it is Order No. 500—*i.e.*, FERC's response to the court's opinion, not the court's opinion itself—that contains the elements they seek to challenge here:

> In rejecting the Commission's analysis of take-or-pay issues, the court of appeals stated that the Commission should consider conditioning producer access to pipeline transportation on producer willingness to modify the so-called "problem contracts." In response, the Commission immediately imposed such a condition on transportation access.

Petition at 9 (footnotes omitted).

The parties to this brief strongly disagree with petitioners' legal objections to the imposition of any remedy under Sections 5 or 7 of the Natural Gas Act, 15 U.S.C.

---

[10] Significantly, petitioners have argued to the contrary before the Commission. The Joint Comments of Indicated Producers (which included 25 of the same companies that are petitioners here (see Appendix D at 15a-20a)) on FERC Order No. 500, Docket No. RM87-34-000 (filed October 13, 1987), argued that the court opinion "merely indicated that the Commission had not provided sufficient explanation why a conditioned access scheme would be unduly discriminatory" (Appendix D at 21a), and that the court "did not direct the Commission to invoke Section 5. Rather, it directed the Commission only to 'reassess' its decision not to do so." Appendix D at 22a.

§§ 717d, 717f. But, even if petitioners' legal arguments were persuasive, they would not present questions warranting review by this Court in the present posture of the proceedings. Since the court of appeals neither affirmed Commission action adversely affecting petitioners nor mandated such action, any consideration by this Court of the legal questions which might be presented by the Commission's actions on remand [11] would necessarily be in the nature of an advisory opinion on issues that are not ripe for review and which may never be involved in a case or controversy before this Court. That is not the function of this Court. As recognized by petitioners themselves (at 16-17 in their Brief in Opposition to petitions filed in Nos. 87-976, 87-977, and 87-1091), any such advisory opinion is precluded by *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

b. Similarly, there is no basis for petitioners' contention that the court of appeals encroached upon Commission authority by substituting its own findings of fact and engaging in its own economic analyses. The three examples cited in support of this proposition in no way demonstrate a lack of judicial deference to agency determinations; rather, they present situations in which the court of appeals, in the proper exercise of its review function, found that the Commission had failed to consider adequately the available options, or that there was a fundamental inconsistency between the Commission's factual findings and ultimate conclusions.

---

[11] The Commission's action on remand in Order No. 500 is presently the subject of review proceedings, too numerous to list and as yet unconsolidated, including actions brought by most of the petitioners in No. 87-978, raising many of the legal issues petitioners seek to have this Court consider in their present petition. No opinions have been issued in these proceedings. The Commission, to date, has taken no action on remand under Section 5 of the Natural Gas Act.

Thus, contrary to petitioners' claim, the Commission itself found that "the bulk of high-cost 'problem' contracts" was for regulated Section 102(d) gas, and therefore indisputably subject to its jurisdiction. *See* 50 Fed. Reg. 52,226 (1985). The court recognized that the Commission had made such a finding, and on that basis rejected FERC's assertion that a Section 5 remedy would be inefficient and inequitable. Pet. App. at 89a. Rather than reaching its own conclusions, the court simply noted an irreconcilable conflict between the Commission's own factual findings and the conclusions it reached therefrom.

Similarly, the court did not dispute the Commission's ability to consider policy objections to government intervention in private contracts in determining whether to order affirmative take-or-pay relief, but found that FERC had failed to consider countervailing policy considerations in light of current market realities and the applicable statutory framework. Pet. App. at 89a-90a.

Finally, the court concluded that the Commission's assumption that producers would voluntarily reform contracts which required the pipelines to pay for high cost gas not taken, and therefore that there was no need for Commission intervention, simply "assumes away the problem of the uneconomical contracts to which pipelines are presently bound" and "confuse[s] the pipelines' *incentive* to renegotiate contracts with their *ability* to do so." Pet. App. at 83a (emphasis in original). But, contrary to petitioners' suggestion, the court of appeals did not direct the Commission to take affirmative action if, on reconsideration, it could support its original position by a rational explanation, founded on a substantial factual predicate.

c. There is no merit to petitioners' argument that the court usurped the Commission's authority by requiring it to consider the problem of unlawful producer contracts in a particular proceeding. Petition at 21-23. The court did not in any way deprive the Commission of its discretion to choose the proceeding in which it will deal with

particular issues;[12] it was the *Commission itself* that chose to consider the problem of uneconomic contracts in this rulemaking. The take-or-pay problem received prominent attention in Order No. 436, and the Commission itself recognized that "current and future take-or-pay obligations could possibly impede development of a more competitive gas market." 50 Fed. Reg. 42,464 (1985). The Commission did not seek to defer the take-or-pay issue to other proceedings; instead, it addressed it in Order No. 436 and reached the conclusion that no further action by it was necessary or appropriate.

In this context, having found that the Commission's rationale for its inaction was legally and factually unsupported, the court of appeals acted within the proper bounds of its authority in directing the Commission to reassess its refusal to act. The crux of Order No. 436—the "unbundling" of the pipelines' transportation and merchant roles—necessitated some contemporaneous treatment of take-or-pay. Order No. 436 had the express purpose of allowing customers to use pipelines for transportation services as an alternative to the pipelines' traditional (merchant) sales services, thereby threatening pipelines with reduced sales volumes and an increased take-or-pay burden. The court recognized these possibilities and found that

> FERC's seeming blindness to the possible impact of Order No. 436 on take-or-pay liability, and its tendency to elevate into affirmative benefits what are at best palliatives, seem impossible to square with the requirement of reasoned decisionmaking.

Pet. App. at 84a. Thus, as both the Commission and the court of appeals recognized, the objectives of Order No. 436 and their inextricable impact upon pipeline take-or-

---

[12] Significantly, the court's opinion contains a number of instances in which it deferred to the Commission's judgment to consider specific issues at another time or place. *See, e.g.*, Pet. App. at 45a-46a; 113a.

pay obligations compelled resolution of the problems caused by uneconomic producer contracts in the present rulemaking.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

FREDERICK MORING *
JENNIFER N. WATERS
TONI M. FINE
CROWELL & MORING
1001 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2505
(202) 624-2500

Attorneys for Respondent
Associated Gas Distributors

WILLIAM T. MILLER
SUSAN N. KELLY
MILLER, BALIS & O'NEIL, P.C.
1101 14th Street, N.W.
Suite 1400
Washington, D.C. 20005
(202) 789-1450

Attorneys for Respondent
American Public Gas Association

JANICE E. KERR
J. CALVIN SIMPSON
MICHAEL B. DAY
PUBLIC UTILITIES COMMISSION OF
THE STATE OF CALIFORNIA
505 Van Ness Avenue
San Francisco, California 94102
(415) 557-0336

Attorneys for Respondent
Public Utilities Commission of
the State of California

* Counsel of Record

RICHARD A. SOLOMON
WILNER & SCHEINER
1200 New Hampshire Avenue, N.W.
Washington, D.C. 20036
(202) 861-7830
Attorney for Respondent New York Public Service Commission

ROBERTA L. HALLADAY
MORGAN, LEWIS & BOCKIUS
1800 M Street, N.W.
Washington, D.C. 20036
(202) 872-7651

C. WILLIAM COOPER
Chairman, United
Distribution Companies
603 Broad Street
Sewickley, Pennsylvania 15143
(412) 741-4836
Attorneys for Respondent United Distribution Companies

March 16, 1988

APPENDICES

APPENDIX A

ASSOCIATED GAS DISTRIBUTORS

Atlanta Gas Light Company

Subsidiaries:

Georgia Gas Company
Georgia Engine Sales & Service
Trustees Investments, Inc.
Georgia Natural Gas Company
Georgia Gas Service Company
Georgia Energy Company

Baltimore Gas & Electric Company

Susidiaries:

BNG, Inc.
Constellation Holdings, Inc.
Constellation Investments, Inc.
Constellation Properties, Inc.

Affiliate:

Safe Harbor Water Power Corporation

Bay State Gas Company

Subsidiaries:

Bay State Exploration, Inc.
Bay State Gas Supply, Inc.
Northern Utilities, Inc.
Granite State Gas Transmission, Inc.

The Berkshire Gas Company

Boston Gas Company

Parent: Eastern Gas and Fuel Associates

The Brooklyn Union Gas Company

Subsidiaries:

Fuel Resources, Inc.
Fuel Resources Gathering, Inc.
Brooklyn Union Exploration Company, Inc.
Gas Energy, Inc.
Methane Development Corporation
Collectaccount Services, Inc.
Star Enterprises, Inc.
Delaware Valley Propane Company

Central Hudson Gas & Electric Corporation

Subsidiaries:

Central Hudson Enterprises Corp.
Central Hudson Cogeneration, Inc.
CH Resources, Inc.
Greene Point Development Corp.
Phoenix Development Co., Inc.

Chesapeake Utilities Corporation

Subsidiaries:

Central Florida Gas Co.
Eastern Shore Natural Gas Co.
Dover Exploration Co.
Skipjack, Inc.
Sharpgas, Inc.

City of Holyoke, Mass., Gas & Electric Department

City of Norwich, Department of Public Utilities

City of Westfield Gas & Electric Light Department

Colonial Gas Company

Subsidiary:

Transgas, Inc.

Commonwealth Gas Co.

Parent: Commonwealth Energy System

Concord Natural Gas Corporation

Subsidiary: Concord Gas Service Corp.

Consolidated Edison Company of New York, Inc.

Delmarva Power & Light Company

Subsidiaries:

Delmarva Energy Company
Delmarva Industries, Inc.
Delmarva Capital Investments, Inc.
DCI I, Inc.
DCI II, Inc.

Elizabethtown Gas Company

Parent: NUI Corporation

EnergyNorth, Inc.

Subsidiaries:

EnergyNorth Realty, Inc.
Gas Service, Inc.
Energy Resources Corp.
Manchester Gas Co.
Concord Natural Gas Corp.
Concord Gas Service Corp.
Rent-A-Space of New England, Inc.

Essex County Gas Company

Fitchburg Gas & Electric Light Company

Subsidiary: Fitchburg Energy Development Co.

Lynchburg Gas Company

Subsidiary: Lynco Development Corp.

New Jersey Natural Gas Company

Parent: New Jersey Resources Corporation

New York State Electric & Gas Corporation

Subsidiary: Somerset Railroad Corporation

North Carolina Natural Gas Corporation

Subsidiaries:

NCNG Exploration Corp.
Cape Fear Energy Corp.

Northeast Utilities

Subsidiaries:

The Connecticut Light and Power Company
Western Massachusetts Electric Company
Holyoke Water Power Company
Northeast Nuclear Energy Company
The Rocky River Realty Company
The Quinnehtuk Company
Northeast Utilities Service Company

Northern Utilities, Inc. (see Bay State Gas Company)

Pennsylvania Gas & Water Company

Parent: Pennsylvania Enterprises, Inc.

Pequot Gas Co.

Philadelphia Electric Company

Subsidiaries:

Adwin Equipment Company
Adwin Realty Company
Conowingo Power Company
Eastern Pennsylvania Development Company
Eastern Pennsylvania Exploration Company
Philadelphia Electric Power Company
The Susquehanna Electric Company
The Susquehanna Power Company

Philadelphia Gas Works

Providence Gas Company

Parent: Providence Energy Corporation

Public Service Company of North Carolina, Inc.

Subsidiaries:

PSNC Natural Resources Corporation
Tar Heel Energy Corp.
PSNC Production Corp.
PSNC Exploration Corp.
PSNC Propane Corp.

Public Service Electric & Gas Company

Subsidiaries:

Energy Pipeline Corporation
Energy Terminal Services Corporation
Mulberry Street Urban Renewal Corporation
PSE&G Overseas Finance N.V.
PSE&G Research Corporation
Public Services Resources Corp.
Community Energy Alternatives, Inc.
Energy Development Corporation
Gasdel Pipeline System, Inc.

South County Gas Co.

South Jersey Gas Co.

Parent: South Jersey Industries, Inc.

The Southern Connecticut Gas Co.

Parent: Connecticut Energy Corp.

UGI Corporation——

Subsidiaries:

AmeriGas, Inc.
AP Propane
AmeriGas II, Inc.
Schwartz Carbonic Company
Industrial Gases, Inc.
Picar, Inc.
AmeriLease, Inc.
ANSUTECH, Inc.
Matheson Gas Products, Inc.
Matheson Gas Products Canada, Inc.
UGI Development Company
Ashtola Production Company
International Petroleum Service Company
Keystone Oilfield Supply Co.
Stimwell Services Company
B&L Services Company
Universal Well Services, Inc.
Target Cementing Co.
UGID Holding Company
Triad Drilling Company
Union Supply Company
Wellhead Compressor Packagers Company
Wellhead Finance Co.

Cryotex, Inc.
Heavy Media, Inc.
Four Flags Drilling Company, Inc.
Tri-Four, Inc.
UGID Drilling Company
UGID Drilling Investing Company
UGI Ethanol Development Corporation
SAM's Well Service, Inc.
Development Leasing Corporation
Physicians Technology Corporation
Capital Housing, Inc.
Skyten Corporation
UGI Realty Company
UGI Finance N.V.

Valley Gas Co.

Parent: Valley Resources, Inc.

Washington Gas Light Co.

Subsidiaries:

Crab Run Gas Co.
Davenport Insulation, Incorporated
Frederick Gas Co., Inc.
Hampshire Gas Co.
Shenandoah Gas Co.
Brandywood Estates, Inc.
Washington Gas Approved Services, Inc.
Rock Creek Properties, Inc.
Utilitrol

APPENDIX B

AMERICAN PUBLIC GAS ASSOCIATION MEMBER SYSTEMS

ALABAMA

Ashland
Athens
Bay Minette
Bridgeport
Brewton
Calera
Columbiana
Cullman
Decatur
Double Springs
Evergreen
Fairhope
Fayette
Florence
Foley
Ft. Payne
Graysville
Guntersville
Hamilton
Huntsville
Jackson
Lafayette
Loxley
Muscle Shoals
Oneonta
Pleasant Grove
Ragland
Rogersville
Russellville
Scottsboro
Sheffield
Sylacauga
Town Creek
Trussville
Tuscumbia

ARIZONA

Benson
Ft. Defiance
Mesa
Safford

ARKANSAS

Harrisburg

CALIFORNIA

Palo Alto

COLORADO

Center
Rangeley

CONNECTICUT

Norwich

FLORIDA

Chipley
Crescent
Ft. Meade
Ft. Pierce
Jasper
Leesburg
Palatka
Sunrise
Tallahassee
Williston
Winter Garden

GEORGIA

Albany
Americus
Bainbridge
Bowman
Camilla
Covington
Crawfordville
Doerun
Elberton
Fitzgerald
Ft. Valley
Hartwell
Louisville
Lumpkin
Manchester
Millen
Monroe
Moultrie
Pelham
Richland
Social Circle
Sparta
Sugar Hill
Summerville
Sylvester
Thomasville
Tifton
Trion
Union Point
Waynesboro
West Point
Winder
Wrens

ILLINOIS

Anna
Bethany
Bluford
Bushnell
Cairo
Cobden
Fairfield
Marshall
Martinsville
McLeansboro
Norris City
Red Bud
Stonington
Sullivan
Tamms
Westville

INDIANA

Huntingburg
Jasper
Linton

IOWA

Coon Rapids
Emmetsburg
Harlan
Hawarden
Lake Park
Lamoni
Manning
Montezuma
Preston
Remsen
Rock Rapids
Sanborn
Sioux Center
West Bend
Woodbine

KANSAS

Neodesha
Winfield

KENTUCKY

Augusta
Leitchfield
Morgantown
Paintsville
Pikeville
Prestonburg
Richmond

LOUISIANA

Basile
Boyce
Grand Isle
Montgomery

MARYLAND

Easton

MASSACHUSETTS

Holyoke
Middleborough
Wakefield
Westfield

MINNESOTA

New Ulm

MISSISSIPPI

Beaumont
Byhalia
Canton
Corinth
Holly Springs
Pontotoc
Raleigh
Utica

MISSOURI

Green City
Hermann
Milan
Montgomery City
New Florence
New Haven
Potosi
Springfield
Unionville

MONTANA

Shelby

NEBRASKA

Central City
Hastings

NEW MEXICO

Las Cruces
Los Alamos
Socorro

NEW YORK

Bath

NORTH CAROLINA

Bessemer City

OHIO

Hamilton

OKLAHOMA

Guymon
Seiling

PENNSYLVANIA

Chambersburg

SOUTH CAROLINA

Bamberg
Clinton
Greenwood
Orangeburg
Union

SOUTH DAKOTA

Watertown

TENNESSEE

Adamsville
Athens
Bolivar
Brownsville
Clarksville
Covington
Dickson
Erwin
Fayetteville
Gallatin
Halls
Hohenwald
Humboldt
Jackson
Jamestown
Lafayette
Lake City
Lewisburg
Loudon
Madisonville
Memphis
Moscow
Newbern
Oneida
Paris
Pikeville
Portland
Pulaski
Ripley
Rockwood
Rogersville
Savannah
Selmer
Sevierville
Smithville
Smyrna
South Fulton
Springfield
Sweetwater
Tiptonville
Troy
Tullahoma
Waverly
Waynesboro

TEXAS

Benevides
Denver City
Pineland
Robstown
Winona

VIRGINIA

Charlottesville

WASHINGTON

Ellensburg

APPENDIX C

UNITED DISTRIBUTION COMPANIES

1. *Battle Creek Gas Company*

   A wholly owned subsidiary of Southeastern Michigan Gas Enterprises, Inc.

2. *Central Illinois Light Company*

   CILCORP Inc. holds 100 percent of the common stock of Central Illinois Light Company ("CILCO"). CILCO's preferred stock is publicly traded. The common stock of CILCO's parent, CILCORP Inc., is also publicly traded.

3. *Central Illinois Public Service Company*

4. *Citizens Gas & Coke Utility*

   A municipally owned distribution utility.

5. *Citizens Gas Fuel Company*

6. *Consumers Power Company*

   A subsidiary of CMS Energy Corporation, a holding company which is publicly traded.

7. *The Dayton Power and Light Company*

   A wholly owned subsidiary of DPL, Inc., which is publicly traded.

8. *The East Ohio Gas Company*

   A subsidiary of Consolidated Natural Gas Company, a holding company which is publicly traded.

9. *Equitable Gas Company*

   A division of Equitable Resources, Inc., which is publicly traded.

10. *Hope Gas, Inc.*

    A subsidiary of Consolidated Natural Gas Company, a holding company which is publicly traded.

11. *Illinois Power Company*

12. *Indiana Gas Company*

    A subsidiary of Indiana Energy, Inc., a holding company which is publicly traded.

13. *Kokomo Gas and Fuel Company*

14. *Michigan Gas Company*

    A wholly owned subsidiary of Southeastern Michigan Gas Enterprises, Inc.

15. *Michigan Gas Utilities Company*

    A subsidiary of Michigan Energy Resources, Inc., a holding company which is publicly traded.

16. *National Fuel Gas Distribution Corporation*

    Parent: National Fuel Gas Company, a public utility holding company.

17. *Niagara Mohawk Power Corporation*

18. *North Shore Gas Company*

    A subsidiary of Peoples Energy Corporation.

19. *Ohio Gas Company*

20. *Orange & Rockland Utilities, Inc.*

21. *The Peoples Gas Light and Coke Company*

    A subsidiary of Peoples Energy Corporation.

22. *The Peoples Natural Gas Company*

    A subsidiary of Consolidated Natural Gas Company, a holding company which is publicly traded.

23. *Richmond Gas Corporation*

24. *The River Gas Company*

A subsidiary of Consolidated Natural Gas Company, a holding company which is publicly traded.

25. *Rochester Gas and Electric Corporation*

26. *Southeastern Michigan Gas Company*

A wholly owned subsidiary of Southeastern Michigan Gas Enterprises, Inc.

27. *Union Electric Company*

28. *West Ohio Gas Company*

A subsidiary of Consolidated Natural Gas Company, a holding company which is publicly traded.

29. *Wisconsin Fuel and Light Company*

30. *Wisconsin Gas Company*

A subsidiary of WICOR, Inc., which is publicly traded. Also, one series of preferred stock issued by Wisconsin Gas Company is publicly traded.

31. *Wisconsin Natural Gas Company*

All of the common stock of Wisconsin Natural Gas Company is owned by Wisconsin Energy Corporation, which is publicly traded.

32. *Wisconsin Southern Gas Company*

APPENDIX D

[Excerpts from Joint Comments of Indicated Producers]

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION

Docket No. RM87-34-000

REGULATION OF NATURAL GAS PIPELINES AFTER PARTIAL WELLHEAD DECONTROL

JOINT COMMENTS OF INDICATED PRODUCERS

THOMAS G. JOHNSON
CHARLES J. MCCLEES, JR.
ELLEN V. GROSS
CRAIG H. WALKER
Attorneys for
SHELL OFFSHORE INC.
SHELL WESTERN E&P INC.
c/o Shell Oil Company
One Shell Plaza
P.O. Box 2463
Houston, Texas 77252-2463
(713) 241-4742

(Additional Producers
Listed On Inside Cover)

October 13, 1987

AMOCO PRODUCTION COMPANY
William T. Benham
P.O. Box 5910-A
Chicago, Illinois 60680

ARCO OIL AND GAS COMPANY,
A Division of Atlantic
Richfield Company
Harris S. Wood
Norma J. Rosner
P.O. Box 2819
Dallas, Texas 75221

Jeanne M. Zaiontz
P.O. Box 2819
Dallas, Texas 75221

ASHLAND EXPLORATION, INC.
L. Eugene Dickinson
P.O. Box 391-AT6
Ashland, Kentucky 41101

CSX OIL & GAS CORPORATION
B. James McGraw
James M. Appelt
P.O. Box 4326
Houston, Texas 77210

CABOT CORPORATION
Rodney Gerik
P.O. Box 4544
Houston, Texas 77210

CHEVRON U.S.A. INC.
Gerald P. Thurmond
575 Market Street
San Francisco, California 94105

John E. Dickinson
P.O. Box 3735
Houston, Texas 77253

Of Counsel

James B. Atkin
David J. Evans
Pillsbury, Madison & Sutro
Suite 1100
1667 K Street, N.W.
Washington, D.C. 20006

CITIES SERVICE OIL AND GAS CORPORATION
Michael L. Pate
P.O. Box 300
Tulsa, Oklahoma 74102

CONOCO INC.
Thomas D. Carmel
Ernest J. Altgelt, III
P.O. Box 2197
McLean Building
Houston, Texas 77252

EXXON CORPORATION
C. Roger Hoffman
Joseph G. Stiles
P.O. Box 2180
Houston, Texas 77252-2180

INDEPENDENT PETROLEUM ASSOCIATION OF AMERICA
Robert C. Platt
1101 Sixteenth Street, N.W.
Washington, D.C. 20036

KERR-MCGEE CORPORATION
John J. Akins
P.O. Box 25861
Oklahoma City, Oklahoma 73125

MARATHON OIL COMPANY
George H. Rothschild, Jr.
P.O. Box 3128
Houston, Texas 77253

MAXUS ENERGY CORPORATION
DIAMOND SHAMROCK OFFSHORE
PARTNERS LIMITED PARTNERSHIP
R. Brent Harshman
LTV Center—Suite 1400
2001 Ross Avenue
Dallas, Texas 75201-2916

MERIDIAN OIL COMPANY
Richard M. Blumberg
P.O. Box 4239
Houston, Texas 77210

MITCHELL ENERGY CORPORATION
Randolph C. Bruton
Paul F. O'Konski
P.O. Box 4000
The Woodlands, Texas 77380

MOBIL OIL CORPORATION
MOBIL OIL EXPLORATION & PRODUCING
SOUTHEAST INC.
MOBIL PRODUCING TEXAS & NEW MEXICO INC.
MOBIL EXPLORATION AND PRODUCING
NORTH AMERICA INC.
Jay G. Martin
Thomas George Wagner
Nine Greenway Plaza—Suite 2700
Houston, Texas 77046

PENNZOIL COMPANY
John B. Chapman
Kathleen E. Magruder
P.O. Box 2967
Houston, Texas 77001

Of Counsel
John K. McDonald
Charles E. Suffling
Butler & Binion
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

PHILLIPS PETROLEUM COMPANY
PHILLIPS 66 NATURAL GAS COMPANY
Larry Pain
Jennifer A. Cates
1258 Adams Building
Bartlesville, Oklahoma 74004

PLACID OIL COMPANY
Ronald D. Hurst
Paul W. Hicks
3900 Thanksgiving Tower
1601 Elm Street
Dallas, Texas 75201

ROSEWOOD RESOURCES, INC.
Leslie J. Burton
200 Crescent Court
Suite 300
Dallas, Texas 75201

STANDARD OIL PRODUCTION COMPANY
Timothy T. West
P.O. Box 4587
Houston, Texas 77210

Of Counsel
JoAnn P. Russell
Butler & Binion
1400 Allied Bank Plaza
1100 Louisiana
Houston, Texas 77002

SUN EXPLORATION AND PRODUCTION COMPANY
Charles L. Spann
Theresa U. Fay
P.O. Box 2880
Dallas, Texas 75221-2880

TEXACO INC.
Ralph J. Pearson, Jr.
David B. Lindberg
P.O. Box 52332
Houston, Texas 77052

UNION OIL COMPANY OF CALIFORNIA
Albert Sylvia, III
Union Oil Center—Room 902
P.O. Box 7600
Los Angeles, California 90051

UNION PACIFIC RESOURCES COMPANY
Kerry R. Brittain
Philip D. Gettig
Mail Station No. 4010
P.O. Box 7
Fort Worth, Texas 76101-0007

* * * *

B. The Crediting Mechanism Is Unduly Discriminatory, Contravening Section 5 Of The NGA.

The Commission has no authority to adopt rules that are unduly discriminatory.[12] The crediting mechanism causes undue discrimination among all segments of the natural gas industry, including buyers, sellers, shippers and pipelines. In Order No. 436, the Commission rejected conditioning producer access because:

> [C]onditioning producer access on take-or-pay relief would be inconsistent with the non-discrimination requirements of both Order No. 436 and the Natural Gas Act.[13]

That statement remains valid. *Associated Gas Distributors* v. *FERC*, *supra*, is not to the contrary. The Court therein merely indicated that the Commission had not provided sufficient explanation why a conditioned access scheme would be unduly discriminatory.[14] The Commission is obliged to consider anti-competitive issues in its proceedings.[15] It did not do so. Instead, the Commission ignored the anti-competitive impact of the crediting mechanism.

* * * *

---

[12] *See* Section 5 of the NGA, 15 U.S.C. § 717d.

[13] Order No. 436-A at 35.

[14] Associated Gas Distributors v. FERC, *supra*, slip opinion at 92-93.

[15] Maryland People's Counsel v. FERC, 761 F.2d 780 (D.C. Cir. (1985).

IV. THE COMMISSION SHOULD REITERATE ITS VIEW THAT ITS POWERS UNDER SECTION 5 OF THE NGA SHOULD NOT BE USED TO REVISE TAKE-OR-PAY PROVISIONS.

A. The Commission's Decision In Order No. 436 Was Correct.

In vacating and remanding Order No. 436, the District of Columbia Circuit directed the Commission to "reassess its refusal to act under § 5" of the NGA [79] with respect to natural gas still subject to the NGA.[80] Accordingly, the Commission specifically requested comments addressing whether it "should invoke its powers under NGA section 5 to modify or set aside jurisdictional contracts with troublesome take-or-pay provisions." [81] The Court did not direct the Commission to invoke Section 5. Rather, it directed the Commission only to "reassess" its decision not to do so. Upon reassessment, the Commission should reaffirm its original determination not to take the "extreme measure" of invoking Section 5.[82]

* * * *

---

[79] 15 U.S.C. § 717d.

[80] Associated Gas Distributors v. FERC, *supra*, slip opinion at 91.

[81] Order No. 500, slip opinion at 30-31. It should be noted that the issue revolves around jurisdictional natural gas, not "jurisdictional contracts." Many natural gas sales contracts cover both gas still subject to the NGA and gas not subject to the NGA. For such contracts the issue is whether the Commission should invoke Section 5 to modify or abrogate the take-or-pay provisions to the extent the provisions cover the natural gas still subject to the NGA.

[82] The *AGD* Court noted that the "[u]nilateral abrogation of a contract is an extreme measure." Associated Gas Distributors v. FERC, *supra*, slip opinion at 66.